Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-855

HELEN A. COHEN,

Petitioner,

vs.

ILLINOIS INSTITUTE OF TECHNOLOGY, AN ILLINOIS NOT-FOR-PROFIT CORPORATION, JAMES J. BROPHY, JOHN T. RETTALIATA, AND MAYNARD P. VENEMA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Dr. Helen A. Cohen, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above case.

OPINION BELOW

The amended opinion of the Court of Appeals for the Seventh Circuit (hereinafter *"Cohen III"*) is reported at 581 F. 2d 658, and is set out in its original form as Appendix I, at pp. 34a-42a. The order of the court of appeals amending the original opinion but denying rehearing is set out as Appendix J, at pp. 43a-44a.

These and prior opinions in this case are set out in the separate Appendix in chronological order.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1978 (App. I, at 34a). A timely petition for rehearing was denied on August 28, 1978 (App. J, at 43a). This Court has jurisdiction pursuant to 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. As to Rule 8, Fed. R. Civ. P.:

   Whether, in a complaint which alleges sufficient State involvement with an otherwise-private institution to invoke 42 U. S. C. § 1983 and 42 U. S. C. § 1985(3), it is additionally necessary, for compliance with Rule 8, Fed. R. Civ. P., to allege "specific facts" detailing the State's involvement with the institution's discriminatory conduct.

2. As to 42 U. S. C. § 1983:

   Whether receipt of significant State aid and support by an otherwise-private institution subjects the institution to the State's obligations under the Equal Protection Clause, enforceable through 42 U. S. C. § 1983, even though there may be no close nexus between the State and the institution's discriminatory conduct.

3. As to 42 U. S. C. § 1985(3):

   Whether 42 U. S. C. § 1985(3), by virtue of § 5 of the Fourteenth Amendment, reaches private, nonracially motivated, invidiously discriminatory conspiracies.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULE INVOLVED

U. S. Constitution, amendment XIV, § 1 and § 5:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Illinois Constitution, Art. I, § 2 and § 17 (1970); effective July 1, 1971):

§ 2. Due Process and Equal Protection.

No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

§ 17. No Discrimination in Employment and the Sale or Rental Property

All persons shall have the right to be free from discrimination on the basis of race, color, creed, national ancestry and sex in the hiring and promotion practices of any employer or in the sale or rental of property.

These rights are enforceable without action by the General Assembly, but the General Assembly by law may establish reasonable exemptions relating to these rights and provide additional remedies for the violation.

42 U. S. C. § 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U. S. C. § 1985. Conspiracy to interfere with civil rights.

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises

of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws: . . . in any cases of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Rule 8, Federal Rules of Civil Procedure:

(a) Claims for Relief. A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. . . .

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

STATEMENT OF THE CASE

This case, alleging denial of equal protection by reason of gender-based discrimination, comes to the Court after the third decision by the U. S. Court of Appeals for the Seventh Circuit (*"Cohen III"*; App. I, at 34a).

In the first decision (*"Cohen I"*; App. B, at 17a) the court of appeals delineated the allegations necessary to state a claim under 42 U. S. C. § 1983 and 42 U. S. C. § 1985. Petitioner then obtained leave to amend her complaint (*"Cohen II"*, App. F., at 27a).

The court of appeals has now held that the amended complaint, though it "contain[s] the precise language noted by this Court to have been missing from the original complaint" (App. I, at 38a), does not state a claim under either statute because it does not plead "specific facts" describing the State's involvement with the institution's discriminatory conduct.

In more detail:

1. The Facts of the Case

Petitioner, Dr. Helen A. Cohen, a woman, was formerly employed as an untenured assistant professor by the respondent Illinois Institute of Technology ("IIT"). In each of the years 1969, 1970, and 1971, she was recommended by her department for a tenured promotion to the senior academic rank of associate professor. IIT refused her the promotion, without explanation. Under the school's tenure-promotion rules, failure to achieve promotion within a designated time meant termination.

In August 1971, while still employed by IIT, she filed charges with the U. S. Department of Labor's Office of Federal Contact Compliance, asserting discrimination on the basis of sex in violation of Executive Order No. 11246.[1] In January 1974, the OFCC compliance agency, the Department of Health, Education and Welfare, found "reasonable cause to believe that complainant was terminated in part because of her sex . . . [and] was discriminated against because of her sex . . . [by being] paid . . . less than the salary of similarly situated males" (App. K, at 45a-49a)[2]. The university's justification was deemed pretextual. (App. K, at 48a).

1. (30 F. R. 12319), 3 C. F. R. § 339 (1964-1965 Comp.), as amended by Executive Order No. 11375, (33 F. R. 14303) 3 C. F. R. § 684 (1966-1970 Comp.).

2. These findings were appended to the original complaint. Additional findings (App. L, at 50a-54a) were made in August 1976 and reconfirmed the January 1974 findings. These additional findings were before the court of appeals in *Cohen III*. HEW and OFCC have yet to take the next step toward enforcement, that is, to initiate discovery leading to a formal hearing.

2. The Original Complaint, and the First Appeal ("Cohen I")

Enforcement action by OFCC not being forthcoming, plaintiff in May 1974 brought suit in the U. S. District Court for the Northern District of Illinois. The complaint was in three counts: Under 42 U. S. C. § 1983, under 42 U. S. C. § 1985(3), and under the Illinois Constitution through pendent jurisdiction. Her complaint asserted that IIT, although formally private, was so involved with the State of Illinois that the acts of IIT are subject to the scrutiny of the Fourteenth Amendment (App. B, at 10a-12a). The individual defendants are the policy-making executives of IIT.

The district court dismissed the complaint on a motion brought under Rule 12, Fed. R. Civ. P (App. A, at 1a). As to the § 1983 count, the court found no allegation of any State aid or support to the university (App. A, at 3a). As to the § 1985(3) count, the court held that "§ 1985(3) requires . . . 'state action' " (App. A, at 3a). The pendent jurisdiction count was accordingly also dismissed.

The Court of Appeals for the Seventh Circuit affirmed (*Cohen I*; App. B, at 7a), but on different grounds. As to the § 1983 count, it examined the allegations of State involvement with IIT and concluded, contrary to the district court, that "[t]he State has lent significant support to IIT; it is not, however, alleged to have lent any support to any act of discrimination" (App. B, at 14a, 15a).

Although recognizing that the § 1983 count was couched in the language of the statute (App. B, at 17a), the court of appeals required further allegations to state a claim and obtain discovery. It held (App. B, at 17a, 18a):

> "Nevertheless, plaintiff argues that since she has alleged the necessary ultimate conclusion in the language of the statute, the complaint should not be dismissed before she has completed discovery which may reveal some nexus between the State of Illinois and defendants' wrongful conduct . . ."

> "We agree that plaintiff is entitled to the fullest opportunity to adduce evidence in support of her claim. But she is not entitled to a trial, or even to discovery, merely to find out whether or not there may be a factual basis for a claim which she has not made. Her complaint omits any allegation of state support or approval of the defendants' discriminatory conduct . . . .
>
> "In the *Weise* [v. *Syracuse University*, 522 F.2d 397 (2nd Cir. 1975)] case, the plaintiff had alleged that the University received so much public aid, both in the form of grants and in payment for services provided under contract, that Syracuse University was dependent on such support for its continued operation. There are no comparable allegations in Dr. Cohen's complaint."

As to the § 1985(3) count, it held that the statute, in terms, would cover a private conspiracy to discriminate on the basis of gender, but, absent State involvement either with the conspirators or "in the provision of facilities to which the victims of the conspiracy were denied equal access" (App. B, at 19a, n.27), the statute could not constitutionally reach such a conspiracy (App. B, at 18a-22a).

A petition for rehearing and suggestion for rehearing *en banc* were denied in an unsigned Order with opinion (App. C, at 32a, 24a).

Certiorari was denied. 425 U. S. 943 (1976).

3. The Motions to Amend the Complaint, and the Mandamus Action ("Cohen II")

The day after denial of certiorari, plaintiff moved in the court of appeals and in the district court to file an amended complaint (under Rules 15(a) and/or 60(b), Fed. R. Civ. P.), to insert the allegations[3] of "support," "approval", and "dependency"

3. The amendment to the complaint sought to add the following allegations:

> "8. (o) the aid and support provided by the State of Illinois, as alleged in subparagraphs (h), (i), (m), and (n) hereof, sig-

(Footnote continued on next page)

found missing by *Cohen I*, and (under Rule 60(b)(2)) to reflect newly discovered evidence concerning the extent of governmental aid—over $20 million dollars per year.

Initially the court of appeals (App. D, at 25a), and then the district court (App. E, at 26a), each denied the motion for want of jurisdiction.

Plaintiff then petitioned the court of appeals for a writ of mandamus.[4] A writ was issued, authorizing the district court to "consider and decide" the adequacy of the amended complaint (*"Cohen II"*; App. F, at 27a).

4. The Denial of the Motion to Amend, and the New Appeal ("Cohen III")

The district court then denied the motion to amend on the ground that:

> "Plaintiff's proposed amendment does not overcome the deficiencies originally found in her complaint in this court (reported at 384 F.Supp. 202) and affirmed by the Seventh Circuit. . . ." (App. G, at 29a, 30a)

Another appeal was taken. Plaintiff made two arguments.

First, under the "law of the case" doctrine, once the court of appeals in *Cohen I* had set out the necessary allegations for pleading a § 1983 and § 1985(3) complaint, it was not open to a district court to hold inadequate a complaint which included the precise language of those allegations.

(Footnote continued from preceding page.)

> nificantly supports and contributes to the effectiveness of the Defendants' conduct complained of herein. The Defendant INSTITUTE is dependent on such State support, and upon similar Federal support, for its continued operation. Both the State and the Federal support are contingent upon the Defendants not engaging in discriminatory hiring or employment practices, and the continuation of such support constitutes State and Federal approval of the conduct complained of herein."

4. *Foman* v. *Davis*, 371 U. S. 178 (1962).

Second, plaintiff asked that the decision in *Cohen I* be reconsidered. *Cohen I* had in the meantime been examined by a number of other courts and by several legal commentators.[5] The Third Circuit Court of Appeals, twice sitting *en banc* in *Braden* v. *University of Pittsburgh*, 552 F. 2d 948 (3rd Cir. 1977), had declined to follow its § 1983 rationale and holding.

Plaintiff suggested a hearing *en banc*, but this was denied (App. H, at 32a).

The court of appeals, in *Cohen III*, affirmed (App. I, at 34a-42a). It first held that the writ of mandamus in *Cohen II* had given plaintiff the right to amend (App. I, at 38a). Then, though it did not question that "the proposed amendment contained the precise language noted by this Court to have been missing from the original complaint" (App. I, at 38a), it held (without reference to Rule 8, Fed. R. Civ. P.):

> *"Cohen I* set out the general nature of the allegations needed but did not state what specific facts need be alleged. In failing to specify what underlying facts would be sufficient to support such a general allegation, we did not obviate the requirement of including the necessary factual allegations." (App. I, at 41a).

Rehearing and rehearing *en banc* were denied. (App. J, at 43a). The order and decision on rehearing modified the decision

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5. *Cohen* I is discussed at length in Maier, " 'State Action' in the Seventh Circuit," 59 *Marquette L. Rev.* 809 (1976), and in Cassel, "Civil Rights and Civil Liberties," 53 *Chicago-Kent L. Rev.* 244 (1976). In *Milner* v. *National School of Health Technology*, 409 F. Supp. 1389, 1394 (E. D. Pa. 1976), a § 1983 complaint that was "strikingly similar" to that in *Cohen I* was sustained notwithstanding citation of *Cohen I*.

A. Larson's "Employment Discrimination," Vol. 1, § 8.20, p. 2-74 (Matthew Bender), states that "The United States Supreme Court has recognized that certain 'private' actions may become so impregnated with state character or policies as to become subject to the same limitations on the states by the Constitution," citing *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961); the June 1978 Cumulative Supplement, p. 63, adds to the citation a discussion of *Cohen I* after the words "But see."

by deleting citation to *Durso* v. *Rowe*, 430 F. Supp. 49, 52 (N. D. Ill. 1977), which, although not so stated, had since been reversed by a different panel, 579 F. 2d 1365 (7th Cir. 1978).[6]

REASONS FOR GRANTING THE WRIT

This case presents issues of fundamental importance to the practical applicability of 42 U. S. C. § 1983 and 42 U. S. C. § 1985(3) in suits against State-supported but otherwise-private institutions and individuals to enforce a State's obligations under the Equal Protection Clause.

Primarily, are actions brought under § 1983 or § 1985(3) against such defendants subject to special pleading requirements beyond the "short and plain statement[s]" of Rule 8, Fed. R. Civ. P.? In particular, is there a requirement that a complaint must allege "specific facts" as to how the State is involved with the institution's discriminatory conduct?

Remaining in court to obtain discovery is critical to the enforceability of these civil rights statutes against State-subsidized private institutions. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance," *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722 (1966). Only by discovery can a plaintiff learn these facts and circumstances. By their very nature, "private" institutions do not maintain public records. Yet the decision below closes the courthouse door before discovery is available. We suggest that in no other type of case is a requirement of pleading "specific facts" less appropriate.

This Rule 8 issue should have been resolved conclusively by *Conley* v. *Gibson*, 355 U. S. 41, 45-46 (1957). Indeed, this Court could, in the interest of economy of its time, grant certiorari and reverse summarily on the authority of *Conley*.

6. See p. 13, *infra*.

We respectfully urge, however, that this Court go beyond the Rule 8 issue. We urge that it reach two substantive issues, each the subject of widespread and acknowledged conflicts among the circuits. The Seventh Circuit adopts minority positions regarding 42 U. S. C. § 1983 and 42 U. S. C. § 1985(3) which severely limit the utility of these statutes in that Circuit.

First, as to "state action" under 42 U. S. C. § 1983, most of the appellate decisions apply the "symbiotic relationship" test of *Burton* v. *Wilmington Parking Authority* to otherwise-private institutions receiving significant State aid and support. Some eight court of appeals decisions, however, including *Cohen I* and *Cohen III*, instead apply exclusively the "close nexus" test of *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 351 (1964).[7] It was for this reason that the Third Circuit, in *Braden* v. *University of Pittsburgh*, 552 F. 2d 948 (3rd Cir. 1977) (*en banc*), declined to follow *Cohen I*.

Second, the circuits are hopelessly divided as to an issue under 42 U. S. C. § 1985(3) left open in *Griffin* v. *Breckenridge*, 403 U. S. 88, 107 (1971); does § 1985(3), by virtue of § 5 of the Fourteenth Amendment, reach private, nonracially motivated, invidiously discriminatory conspiracies? The First, Second, Third, Fifth (until its decision was withdrawn as moot), Sixth, and Eighth Circuits hold it does. The Fourth, Seventh, and Ninth hold it does not.

7. To use the current vernacular, the "bottom line" is that a State subsidy of $400 per graduate invokes § 1983 when a court applies the "symbiotic relationship" test (*Grafton* v. *Brooklyn Law School*, 478 F. 2d 1137, 1142 (2nd Cir. 1973)), while $9,600 per student *per year* does not when a court applies only the "close nexus" test (*Cannon* v. *University of Chicago*, 559 F. 2d 1063 (7th Cir. 1977), *cert. granted*, 46 U. S. L. W. 3803 (No. 77-926, July 3, 1978)). And, as *Cannon* and *Cohen III* (App. I, at 39a) hold, "even assuming financial aid and assistance by the State *in whatever amounts*, such aid and assistance is insufficient for jurisdiction under § 1983" (emphasis added).

Cannon and the instant suit are companion cases on the § 1983 issue. *Cohen I* was held "fully dispositive of [the] § 1983 claim" in *Cannon*, 559 F. 2d at 1070, and *Cannon* is the only § 1983 precedent relied on in *Cohen III* (App. I, at 39a).

THE COURT OF APPEALS, BY REQUIRING A PLAINTIFF TO PLEAD "SPECIFIC FACTS", HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

Not often does one encounter a court of appeals decision which is in direct, literal, conflict with a decision of this Court. *Cohen III* is such a case.

Cohen I carefully delineated the allegations necessary under Rule 8, FED. R. CIV. P. for pleading a complaint under § 1983, and also under § 1985(3). Petitioner's amended complaint, as *Cohen III* recognized, included the "precise language" of *Cohen I* for the § 1983 count, and correspondingly for the § 1985(3) count.

Yet *Cohen III*, without reference to Rule 8, holds (App. I, at 43a) that "specific facts" must be alleged:

> "*Cohen I* set out the general nature of the allegations needed but did not state what specific facts need be alleged. In failing to specify what underlying facts would be sufficient to support such a general allegation, we did not obviate the requirement of including the necessary factual allegations." (App. I, at 41a).

Conley v. *Gibson*, 355 U. S. 41, 47 (1967), had similarly treated with a contention that "specific facts" must be alleged. But *Conley*, in literal contrast to *Cohen III*, held:

> "The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim."

Further, the holding below conflicts in principle with *Haines* v. *Kerner*, 404 U. S. 519 (1972), *rev'g* 427 F. 2d 71, 73 (7th Cir. 1971) and applying *Conley* to "purely conclusory statements . . . [to] show that the Defendants acting under color of

state law or in conspiracy abridged his Constitutional rights." Where the present amended complaint alleges, in response to *Cohen I*'s requirement of pleading "dependency" (App. B, at 18a), that:

> "The Defendant INSTITUTE is dependent on such State support . . . for its continued operation" —

Cohen III (App. I, at 40a) terms this "only a conclusory allegation of dependency." And where it alleges, in response to *Cohen I's* requirement of pleading "approval" (App. B, at 17a), that:

> ". . . the State . . . support [is] contingent upon the Defendants not engaging in discriminatory hiring or employment practices, and the continuation of such support constitutes State . . . approval of the conduct complained of herein"—

Cohen III terms this an "insufficient 'conclusory speculation' that the continued support in the face of discriminatory conduct amounted to approval of the conduct" (App. I, at 40a).

As noted earlier, a requirement of pleading "specific facts" is particularly inappropriate to actions brought under § 1983 or § 1985(3) against otherwise-private institutions. The Seventh Circuit does not require such specificity elsewhere. *Durso* v. *Rowe*, 430 F. Supp. 49, 52 (N. D. Ill. 1977), the citation to which in *Cohen III* (App. I, at 40a) was withdrawn on petition for rehearing (App. J, at 44a), was later reversed by the Seventh Circuit (579 F. 2d 1365, 1371 (7th Cir. 1978)) for the reason that the trial court had improperly required pleading "particularized facts." The court of appeals tersely said, "That is the job for discovery." It noted:

> "If the complaint was vague or lacked detail, defendants should have filed a motion for a more definite statement under Rule 12(e), not a motion to dismiss. See 2A J. Moore, Federal Practice § 12.08 (2nd ed. 1974)."

Inexplicably, the holdings of *Conley*, and of *Haines* and *Durso*, were not applied in *Cohen III*.

THE COURT OF APPEALS HAS RENDERED A DECISION ON WHAT CONSTITUTES "STATE ACTION" UNDER 42 U. S. C. § 1983 IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS IN THE SAME MATTER

The various courts of appeals are sharply split as to whether a State's giving "significant" aid and support to an otherwise-private institution is, by itself, sufficient "state action" to invoke 42 U. S. C. § 1983 when the institution engages in invidious discrimination. The majority holds that it is. A minority, including *Cohen I* and *Cohen III*, imposes a further requirement: there must be a close connection, or nexus, between the State support and the discriminatory policies, conduct or acts.

This Court has held that the requirement of "state action" for § 1983 is satisfied as to an otherwise-private defendant (a) when the State and the defendant have a "symbiotic relationship" in which the State has "so far insinuated itself into a position of interdependence with [the defendant] that it must be recognized as a joint participant in the challenged activity" (*Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 725 (1961)), or (b) when "there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself" (*Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 351 (1964)).

An overwhelming majority of the lower courts have adopted the "symbiotic relationship" test and its corollary that "significant" State aid and support,[8] alone and by its very nature, puts the State in cahoots with private discrimination:

8. Following the lead of Judge Friendly's dicta in *Powe* v. *Miles*, 407 F. 2d 73, 82 (2nd Cir. 1968), to the effect that there is a "peculiar offensiveness of the state's taxing all citizens for objectives from the benefits of which a particular category is arbitrarily excluded", virtually all judicial circuits, with the exception of the Third, have adopted a double standard for determining "state action." A "less onerous" test is applied where invidious discrimination is al-

(Footnote continued on next page)

First Circuit: Fortin v. *Darlington Little League Inc.*, 514 F. 2d 344 (1st Cir. 1975).

Second Circuit: Powe v. *Miles*, 407 F. 2d 73 (2nd Cir. 1968); *Coleman* v. *Wagner College*, 429 F. 2d 1120 (2nd Cir. 1970); *Grafton* v. *Brooklyn Law School*, 478 F. 2d 1137 (2nd Cir. 1973); *Wahba* v. *New York University*, 492 F. 2d 96 (2nd Cir. 1974), *cert. denied*, 419 U. S. 874 (1974); *Jackson* v. *Statler Foundation*, 496 F. 2d 623 (2nd Cir. 1974); *cert. denied*, 420 U. S. 927 (1975); *Weise* v. *Syracuse University*, 522 F. 2d 397 (2nd Cir. 1975).

Third Circuit: Braden v. *University of Pittsburgh*, 477 F. 2d 1 (3rd Cir. 1973); *Braden* v. *University of Pittsburgh*, 552 F. 2d 948 (3rd Cir. 1977) (*en banc*); *Chalfant* v. *Wilmington Institute*, 574 F. 2d 739 (3rd Cir. 1978) (*en banc* 8:2 decision).

Fourth Circuit: Kerr v. *Enoch Pratt Free Library of Baltimore City*, 149 F. 2d 212 (4th Cir. 1945), *cert. denied*, 326 U. S. 721 (1945); *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (4th Cir. 1963) (*en banc* 3:2 decision), *cert. denied*, 376 U. S. 938 (1964); *Sams* v. *Ohio Valley General Hospital Ass'n.*, 413 F. 2d 826 (4th Cir. 1969) (2:1 decision); *Doe* v. *Charleston Area Medical Center, Inc.*, 529 F. 2d 638 (4th Cir. 1975).

Fifth Circuit: Hammond v. *University of Tampa*, 344 F. 2d 951 (5th Cir. 1965); *Robinson* v. *Price*, 553 F. 2d 918 (5th Cir. 1977).

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leged, a "more stringent" one where other rights are involved. The Third Circuit seemingly adopts the "less onerous" test for all rights, *Parks* v. *"Mr. Ford"*, 556 F. 2d 132, 153 (3rd Cir. 1977) (collecting cases from other circuits). *See also Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 190, 191 (1970) (Brennan, J., concurring and dissenting); *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 373, 374 (1974) (Marshall, J., dissenting).

A strong minority, however, takes a contrary view. These apply the "close nexus" test exclusively. The minority thus requires a further allegation, and then proof, that there is a causal relationship, or "close nexus," between the State aid and the discriminatory conduct.

Those courts of appeals which have exclusively applied the "close nexus" test to State aid are:

> *Second Circuit: New York City Jaycees* v. *United States Jaycees, Inc.*, 512 F. 2d 856 (2nd Cir. 1975) (gender discrimination, Jaycees).
>
> *Third Circuit: Magill* v. *Avonworth Baseball Conference*, 516 F. 2d 1328 (3rd Cir. 1975) (gender, baseball conference).
>
> *Fifth Circuit: Golden* v. *Biscayne Bay Yacht Club*, 530 F. 2d 16 (5th Cir. 1976) (racial and religious, yacht club; *en banc* 8:5 decision), *rev'g on rehearing* 521 F. 2d 344 (5th Cir. 1975) (2:1 decision).
>
> *Seventh Circuit: Cohen I* (gender, university); *Cannon* v. *University of Chicago*, 559 F. 2d 1063 (7th Cir. 1976) (gender, medical school), *cert. granted*, 46 U. S. L. W. 3803; *Cohen III* (gender, university).
>
> *Eighth Circuit: Junior Chamber of C. of K. C., Mo.* v. *Missouri St. J. C. of C.*, 508 F. 2d 1031 (8th Cir. 1975) (gender, Jaycees; 2:1 decision).
>
> *Tenth Circuit: Jr. C. of C., Rochester, Inc., N. Y.* v. *U. S. Jaycees, Tulsa, Okla.*, 495 F. 2d 883 (10th Cir. 1974), *cert. denied*, 419 U. S. 1026 (1974) (gender, Jaycees).

In all eight cases the plaintiff lost. In seven of the eight the complaint had alleged gender-based discrimination.

These conflicts[9] came to a head in the second *Braden* case, *Braden* v. *University of Pittsburgh*, 552 F. 2d 948 (3rd Cir.

9. The law reviews uniformly criticize nexus as applied to State aid and support. See Yackle, "The Burger Court, 'State Action' and

(Footnote continued on next page)

1977). There, the Third Circuit, after extensive discovery and an evidentiary hearing, authorized an interlocutory appeal and twice convened *en banc* to consider "whether *Jackson* has superseded *Burton*." The court concluded that "*Burton* retains vitality," and that "*Burton* and *Jackson* stand as two models of state-action analysis."

Braden II considered at length *Cohen I*, "perhaps the most important of these [university] cases," *id.* at 964. Inasmuch as "*Cohen* [*I*] appears to have utilized the 'close nexus' test of *Jackson*," *id.* at 965, *Cohen I* was not followed.

Judge Garth concurred separately in *Braden II* ("summary judgment procedures are poorly suited for deciding state action questions," *id.* at 976). He argued that *Cohen I's* "analysis of the appropriate state action standards is exactly the same as mine and consequently at odds with the view expressed by the majority of the court," *id.* at 975.

The court below acknowledges *Braden II*, but not the conflict.

(Footnote continued from preceding page.)

Congressional Enforcement of the Civil War Amendments," 27 *Ala. L. Rev.* 479, 517 n. 158 (Fall, 1975); Note, "Legislative State Action and Indiana Private Universities", 9 *Valparaiso L. Rev.* 611, 615 (1975); Elkind, "State Action: Theories for Applying Constitutional Restrictions to Private Activity," 74 *Colum. L. Rev.* 656, 674 (1974); Note, "State Action and the United States Junior Chamber of Commerce," 43 *G. Wash. L. Rev.* 1407, 1434 (August, 1975); Note, " 'State Action' in the Seventh Circuit," 50 *Marquette L. Rev.* 809, 818 (1976).

See especially:

> "Such a requirement [of direct governmental involvement in the activity under challenge] suggests, for example, that if a southern state university could find a donor willing to endow a chair for the director of admissions, it might refuse black students with complete impunity," O'Neil, "Private Universities and Public Law," 19 *Buff. L. Rev.* 155, 160 n. 21 (1970).

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW, AS TO WHETHER 42 U. S. C. § 1985(3) REACHES PRIVATE NONRACIAL CONSPIRACIES, WHICH QUESTION HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT; THE DECISION CONFLICTS DIRECTLY WITH DECISIONS OF OTHER COURTS OF APPEALS IN THE SAME MATTER

Subsequent to *Griffin* v. *Breckenridge*, 403 U. S. 88 (1971), some seventeen court of appeals decisions (and several times as many district court decisions) have treated with the issue, specifically left open in *Griffin*, of whether § 1985(3), by virtue of Section 5 of the Fourteenth Amendment, can reach a private conspiracy to discriminate which is based on a nonracial animus. The First, the Second, the Third, the Fifth (until its opinion was withdrawn as moot), the Sixth, and the Eighth Circuits have ruled in the affirmative; the Fourth, the Seventh, and the Ninth have held the opposite. These conflicts are widely recognized.[10]

This Court in *Griffin* held that 42 U. S. C. § 1985(3) could reach private conspiracies where there was an invidiously discriminatory animus, 403 U. S. at 102. But it stated the necessity

10. *Cohen I* declined to follow *Weise* v. *Syracuse University*, 522 F. 2d 397 (2nd Cir. 1975), and *Richardson* v. *Miller*, 446 F. 2d 1247 (3rd Cir. 1971), on the ground that they were "without careful consideration of the [constitutional] issue" (App. B, at 20a), and distinguished *Action* v. *Gannon*, 450 F. 2d 1227 (8th Cir. 1971) (*en banc*), and *Westberry* v. *Gilman Paper Co.*, 507 F. 2d 206 (5th Cir. 1975), *opinion withdrawn as moot*, 507 F. 2d at 216, as they involved First Amendment rights which are "often accorded special deference" (App. B, at 21a, n.33). In *Murphy* v. *Mount Carmel High School*, 543 F. 2d 1189, 1193 (7th Cir. 1975), a different panel held that, "[w]ith all respect, we are unable to discern a reasoned distinction" between the First Amendment rights of *Action* and *Westberry* and the Fourteenth Amendment rights of *Cohen I*.

See also McLellan v. *Mississippi Power & Light Co.*, 526 F. 2d 870, 880 n.20 (5th Cir. 1976) ("Much controversy has been raised") *rev'd on rehearing*, 545 F. 2d 919, 926, 927 n.32 (5th Cir. 1977) ("the circuit courts have divided;" *en banc* 9:3 decision); *Murphy* v. *Mount Carmel High School*, 543 F. 2d 1189, 1194 (7th Cir. 1976) ("our holding squarely conflicts with the position taken by the Eighth Circuit").

of "consider[ing in each case] whether Congress had constitutional power to enact a statute that imposes liability under federal law for the conduct alleged," *id.* at 103. Power was found in *Griffin* under the Thirteenth Amendment and under the federal right to travel, but this Court expressly reserved the question whether Section 5 of the Fourteenth Amendment could provide the necessary constitutional tie, *id.* at 107. It said:

> "In identifying these two constitutional sources of congressional power, we do not imply the absence of any other. More specifically, the allegations of the complaint in this case have not required consideration of the scope of the power of Congress under § 5 of the Fourteenth Amendment.[12]"
>
> * * *
>
> "[12]See *Katzenbach* v. *Morgan*, 384 U. S. 641; *Oregon* v. *Mitchell*, 400 U. S. 112, 135 (opinion of DOUGLAS, J.), 229 (opinion of BRENNAN, WHITE, and MARSHALL, JJ.); *United States* v. *Guest*, 383 U. S. 745, 761 (CLARK, J., concurring), 774 (BRENNAN, J., concurring and dissenting)."

Six circuits would probably sustain the § 1985(3) count in the original complaint. They include:

First Circuit: Harrison v. *Brooks*, 466 F. 2d 404 (1st Cir. 1971) (zoning; state action present but not relied on).

Second Circuit: Weise v. *Syracuse University*, 522 F. 2d 397 (2nd Cir. 1975) (gender, university).

Third Circuit: Richardson v. *Miller*, 446 F. 2d 1247 (3rd Cir. 1971) (whites advocating racial equality, private employment); *Phillips* v. *Trello*, 502 F. 2d 1000 (3rd Cir. 1974) (personal harassment; state action present but not relied on).

Fifth Circuit: Westberry v. *Gilman Paper Co.*, 507 F. 2d 206 (5th Cir. 1975), *opinion withdrawn as moot* 507 F. 2d at 216 (environmentalist, private employment).

Sixth Circuit: Azar v. *Conley*, 456 F. 2d 1382 (6th Cir. 1972) supporters of political candidate; state action

present but not relied on); *Cameron* v. *Brock*, 473 F. 2d 608 (6th Cir. 1973) (same); *Marlowe* v. *Fisher Body*, 485 F. 2d 1057 (6th Cir. 1973) (religion and national origin, private employment).

Eighth Circuit: Action v. *Gannon*, 450 F. 2d 1227 (8th Cir. 1971) (blacks interfering with religious observation: *en banc*); *Means* v. *Wilson*, 522 F. 2d 833 (8th Cir. 1975), *cert. denied*, 424 U. S. 958 (1976) (supporters of political candidate, Indian tribe).

Those circuits which would, or would probably, dismiss the present § 1985(3) count are:

Fourth Circuit: Bellamy v. *Mason's Stores, Inc. (Richmond)*, 508 F. 2d 504 (4th Cir. 1974) Ku Klux Klan member, private employment; separate opinion suggests that majority holds § 1985(3) is applicable to Fourteenth Amendment rights); *Doski* v. *M. Goldseker Co.*, 539 F. 2d 1326 (4th Cir. 1976) (gender, private employment).

Seventh Circuit: Dombrowski v. *Dowling*, 459 F. 2d 190 (7th Cir. 1972) (criminal lawyer, office rental);[11] *Lesser* v. *Braniff Airways, Inc.*, 518 F. 2d 538 (7th Cir. 1975) (airline passenger; dicta); *Cohen I* (gender, university); *Murphy* v. *Mount Carmel High School*, 543 F. 2d 1189 (7th Cir. 1975) (racial and gender, religious high school); *Cohen III* (gender, university).

Ninth Circuit: Lopez v. *Arrowhead Ranches*, 523 F. 2d 924 (9th Cir. 1975) (citizens and legally-admitted farm workers, private employment).

11. *Dombrowski*, the earliest of the decisions in this category, has been termed both "the best judicial discussion available of the question whether Section 5 of the fourteenth amendment empowers Congress to regulate private action," *Britt* v. *Suckle*, 453 F. Supp. 987, 1001 n.24 (E. D. Tex. 1978), and one which "unnecessarily narrow[s] the holding of *Griffin*," *Reichardt* v. *Payne*, 396 F. Supp. 1010, 1017 (N. D. Cal. 1975).

Incredible as it may seem, not one of these seventeen decisions has discussed *Katzenbach* v. *Morgan* and its progeny.[12]

Three perceptive district courts have explored the reach of § 1985(3) in light of the *Morgan* line of cases. *Commonwealth of Pennsylvania* v. *Local Union No. 542*, 347 F. Supp. 268, 291-99 (E. D. Pa. 1972) (Higginbotham, J.), sees these as making § 1985(3) applicable to private non-racial conspiracies. *Baer* v. *Baer*, 450 F. Supp. 481, 492-95 (N. D. Cal. 1978) (Spencer Williams, J.), finds otherwise. *Britt* v. *Suckle*, 453 F. Supp. 987, 999 (E. D. Tex. 1978) (Justice, J.), seemingly favors the expansive view but in the end relies on the Seventh Circuit's *Dombrowski* and *Cohen I* which do not mention *Morgan et al.*

This issue has received the attention of many legal commentators and is the subject of extensive scholarly opinion and dispute.[13] We have set forth in the margin a listing, not warranted to be complete, of law review articles and notes on the controversy. If there is any consensus, it is that expressed by one

12. *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 438, 439 (1968); and *Oregon* v. *Mitchell*, 400 U. S. 112 (1970). See also *District of Columbia* v. *Carter*, 409 U. S. 418, 424 n.8 (1973) ("This is not to say, of course, that Congress may not proscribe purely private conduct under § 5 of the Fourteenth Amendment.")

13. Hemphill, "State Action and Civil Rights," 23 *Mercer L. R.* 519 (1972); Estreicher, "Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments," 74 *Colum. L. Rev.* 449 (1974); Orloski, "The Enforcement Clauses of the Civil War Amendments: A Repository of Legislative Power", 40 *St. John's L. Rev.* 493 (1975); Roth, "Private Interference with an Individual's Civil Rights: A Redressable Wrong under § 5 of the Fourteenth Amendment?" 51 *Notre Dame Lawyer* 120 (1975); Yackle, "The Burger Court, 'State Action' and Congressional Enforcement of the Civil War Amendments," 27 *Ala. L. Rev.* 479 (1975); Note, "Absent State Involvement, Right of Association Not Protected by 42 U. S. C. § 1985(3)," 9 *Richmond L. Rev.* 753 (1975); Note, "Defining the Scope of the Enforcement Clause of the Fourteenth Amendment—*Murphy* v. *Mount Carmel High School*," 36 *DePaul L. Rev.* 682 (1977); Note, "Private Conspiracies to Violate Civil Rights; *McLellan* v. *Mississippi Power & Light Co.*," 90 *Harv. L. Rev.* 1721 (1977).

author[14] that the issue is still open before this Court "and invites a definitive response."

CONCLUSION

In the abstract, there may be merit in IIT's suggestion that plaintiff should "assert . . . [her] federal agency claims". But HEW has not even taken the first step toward enforcing an agency complaint filed in 1971.[15]

Perhaps also there may be merit, in the abstract, in the Second Circuit's often quoted statement:

> "Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a university level are probably the least suited for federal court supervision." *Faro* v. *New York University*, 502 F. 2d 1229 (2nd Cir. 1974).

But, as that Circuit has recently said, in recanting *Faro:*

> "The pervasive nature of discriminatory university employment practices has been well documented in the literature, and was characterized in the Congressional debates preceding the passage of the 1972 amendments as 'truly appalling,' 'gross' and 'blatant.'
>
> "It is clear beyond cavil, then, that the Congress has evidenced particular concern for the problem of employment bias in an academic setting. Indeed, it might be said that far from taking an anti-interventionist position with respect to the academy, the Congress has instructed us to be particularly sensitive to evidence of academic bias."

14. Note, "Absent State Involvement, Right of Association Not Protected by 42 U. S. C. § 1985(3)" 9 *Richmond L. Rev.* 753 (1975).

15. "Clearly, the promise of equal employment opportunity has not been achieved in institutions of higher education; HEW's failure to enforce the Executive orders has played no small role in frustrating this objective." United States Commission on Civil Rights, "The Federal Civil Rights Enforcement Effort—1974," Vol. III, p. 305. "To Insure Equal Education Opportunity," (January, 1975).

> *Powell* v. *Syracuse University*, 580 F. 2d 1150 (2nd Cir. 1978) (Footnotes omitted).

In the last analysis, civil rights plaintiffs must look to the courts. And the doors of the courthouse should not be closed by technical pleadings requirements.

We believe that this Count can, by reason of the direct conflict between *Cohen III* and *Conley* v. *Gibson*, grant certiorari and reverse summarily. In the interest of economy of its time, this Court may wish to do so.

We urge, however, that it reach the substantive issues presented under 42 U. S. C. § 1983 and under 42 U. S. C. § 1985 (3).

In either event, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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